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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CIRILO CASTILLO et al., Defendants and Appellants.	B234835 (Los Angeles County Super. Ct. No. MA046882)

APPEAL from judgments of the Superior Court of Los Angeles County, Hayden A. Zacky. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant Cirilo Castillo.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant Larry Rodriguez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer, and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendants and appellants Cirilo Castillo and Larry Rodriguez of carjacking (Pen. Code, § 215, subd. (a); count 1),[1] attempted second degree robbery (§§ 664, 211; count 2), and arson of property (§ 451, subd. (d); count 3). As to all three counts, the jury found the offenses were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b).) As to counts 1 and 2, the jury found a principal personally used a firearm (§ 12022.53, subds. (b), (e)(1)), and that Castillo personally used a firearm (§ 12022.53, subd. (b)).

Castillo contends the trial court erred in ruling on his *Pitchess*[2] motion, by denying his request for an instruction on third party culpability, and by not bifurcating the gang allegations. He also claims there is insufficient evidence to support every conviction and allegation found true by the jury. Rodriguez contends insufficient evidence supports his arson conviction, the prosecutor committed misconduct, and his counsel was ineffective for failing to object the prosecutor's misconduct. Castillo and Rodriguez join each other's arguments. We affirm both judgments.

FACTS

Count 1 — The Carjacking

On September 13, 2009, at around 4:30 p.m., Octavio B., and his wife, Dalia I., and their two young children were driving in the family's four-door Honda Civic to their home in Baldwin Park. As Octavio parked the car, and was about to get his children out of the back seat, he saw three males — Castillo and Rodriguez, joined by Edgar Ruiz — approach the family's car.[3] Rodriguez asked Octavio in Spanish for the keys to his car, and Castillo lifted his shirt to show a handgun in his waistband. Octavio handed over his keys. The carjackers began getting into the car. One of the children was still in the car.

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1 All further section references are to the Penal Code unless otherwise stated.

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

3 Ruiz was jointly charged with Castillo and Rodriguez, but tried separately. In an earlier opinion, we addressed a separate appeal by Ruiz. (*People v. Ruiz* (May 25, 2012, B229633) [nonpub. opn.].)

Dalia asked Rodriguez in Spanish if she and Octavio could get their child, and Rodriguez said yes. Castillo asked Octavio for his wallet, but, when Dalia asked them not to take the wallet, Castillo said, "It's okay. Not the wallet." Dalia then asked Rodriguez not to take the car. Rodriguez replied he was "very sorry," but he "needed the car."

On September 16, 2009, Los Angeles County Sheriff's Department (LASD) Sergeant Ernie Dearmas went to Octavio's work, and showed him three "six-pack" photographic lineups, one of which contained Castillo's photograph. Octavio picked Castillo's photograph from the lineup. Sergeant Dearmas also showed the six-packs to Dalia, but she did not identify Castillo's photograph. At trial, Octavio and Dalia both identified Castillo and Rodriguez, and both identified Castillo as the assailant with the gun.

Count 2 — The Attempted Robbery

On September 15, 2009, at around 8:00 a.m., David F. was outside his home in Lancaster, preparing to mow and edge his lawn. He had a weed whacker. David saw a black or dark blue, four-door Honda pull up, and two males get out of the car's back seat. One of them walked up to David from behind, while the other walked up to David from the front. The male in front of David told David to give his wallet to the other assailant. Instead, David "gunned" the weed whacker and raised it toward the male in from of him. At that point, the male behind David went back to the car. At the same time, the male in front of David pulled out a handgun and pointed it at David. The gunman said something that David could not hear over the noise from the weed whacker. The gunman then also went back into the car, and the car drove away. David called police about 15 minutes later.

David F. was able to identify his assailants on the day of the crime. LASD Deputy Diego Andrade picked up David at his home to conduct a field identification at the location where Castillo, Rodriguez and Ruiz were being detained.[4] David was asked to

[4] Castillo, Rodriguez and Ruiz were detained after they were seen running from a burning vehicle. The circumstances surrounding the detention of the defendants is part of the facts regarding the arson offense discussed below.

identify Castillo, Rodriguez and Ruiz, who were shown to David individually. David identified all three as being involved in the incident at his house. David identified Castillo and Rodriguez based on their height, build and clothes. David said he was "about 90, 95 percent sure" of his identification. David identified Castillo as the gunman.

At trial, David F. did not identify Castillo or Rodriguez as the assailants who had attempted to rob him. However, David described the two assailants as having black hair, appearing to be Hispanic, wearing white T-shirts and blue jeans. He further indicated the gunman also had a mustache, and he may have been wearing a black jacket or black button down shirt. At trial, a detective who arrested Rodriguez and Castillo noted that their appearances had changed since he saw them in September 2009. They no longer had shaved heads, and they were both wearing glasses.

Count 3 — The Arson and the Apprehension of Castillo and Rodriguez

During the morning hours of September 15, 2009, LASD Detective Dale Parisi and his partner were on patrol when they received a radio broadcast of a recent robbery in the Lancaster area. The suspects were described as three Hispanic males, approximately 18 to 21 years old, in a dark-colored, four-door vehicle, possibly a Honda. As Detective Parisi and his partner drove past Avenue K, they saw smoke coming from the desert. The officers drove onto a dirt roadway into the desert and came upon a dark-colored car that was on fire from the steering wheel area to the back seat. The distance from the reported attempted robbery to the area of the burning car was less than two miles. Detective Parisi ran the license plate number on the burning car and received information that it had been "taken during the commission of a carjacking." The suspects for the carjacking were described as three Hispanic males, 18 to 21 years old.

While on the scene with the fire department, Detective Parisi received a radio broadcast that other deputies were in pursuit of three male suspects running through the desert near 15th Street East and Avenue L.

LASD Deputy Daniel Mahoney and his partner, Deputy Erik Riddle, also heard a series of the radio broadcast reporting a robbery and the arson. They drove in the direction of the area relayed by the broadcasts. Near Avenue L toward 15th Street, a

group of workers pointed the officers northbound. When Deputy Mahoney arrived at the area where he had been pointed, he saw three males running northbound. Deputy Mahoney drove after the running suspects until they reached and climbed over a block wall behind a property on Yaffa Street. Deputies Mahoney and Riddle climbed over the wall, where they found and apprehended Ruiz. Detective Riddle searched Ruiz and recovered a Honda key in his front pocket. Meanwhile, other officers who had also driven to the area apprehended Castillo and Rodriguez. When Detective Parisi arrived at the scene, he saw Castillo and Rodriguez being detained in the front yard of a property on Yaffa Street. At trial, Deputy Mahoney identified Castillo and Rodriguez as two of the men he saw running.

Detective Parisi searched Castillo and recovered two black gloves and two cigarette lighters from Castillo's pocket. Detective Parisi collected the shoes from all three suspects. Castillo wore Converse shoes with a triangle and diamond pattern on the bottom; Rodriguez wore Adidas shoes with a chevron pattern on the bottom; Ruiz wore Nike shoes with a chevron pattern on the bottom. Deputies Mahoney and Riddle returned to the area around 15th Street East and Avenue L. They found three sets of shoe prints that traced back to the burned car. Deputy Riddle called Detective Parisi and described the shoe prints. The description of footprints sounded to Detective Parisi like an "exact match" with the three defendants' shoes, and, at trial, he opined that the shoe prints matched. Deputy Christian Chamness also assisted in the events on September 15, 2009. He backtracked the path traveled by the suspects from the desert to the housing tract where they were apprehended. He recovered a handgun concealed under a bush which had been pointed out by Ruiz.

At the scene, David identified the charred car. He said it looked similar to the car he had seen in front of his house in terms of its size and that it also had four-doors.

When Deputy Andrade booked Castillo, Castillo stated that he lived in Baldwin Park, the location of the carjacking. He had "Latin" tattooed on his left arm, and "Kings" tattooed on his right arm.

The Investigation

LASD Sergeant Derek Yoshino investigated the arson. He opined that the car fire resulted from the direct application of an open flame to a combustible material and that the fire was quickened by an accelerant. An aerosol can, which could have been the accelerant, was found in the front seat of the car.

LASD Detective Richard Cartmill investigated the attempted robbery and arson. He interviewed Castillo, Rodriguez and Ruiz in the field shortly after they were detained. At the time Detective Cartmill conducted the interviews, Rodriguez had "SGV" and a marijuana leaf tattooed on his arm. Rodriguez denied any gang membership, but admitted he went by the moniker "Little Joker." Castillo had "Latin" tattooed on one arm and "Kings" on the other. Ruiz said he was a member of the Pasadena Latin Kings (PLK) gang, and that his moniker was "Joker." Castillo said multiple times that he was "fucked." Castillo said he was member of the PLK gang, that his moniker was "Casper," and that he was the "big homey" of the group. Castillo stated that he lived in Baldwin Park. When Detective Cartmill informed Castillo that he had been identified as the gunman during the attempted robbery, Castillo yelled he "wasn't the person with the gun when we hit up that guy in the garden," and denied any involvement. When Detective Cartmill noted Castillo's statement, Castillo said the detective was "twisting his words around," and yelled he was "guilty of everything and just to send him to prison."

At trial, Detective Cartmill noted that, since the time of their arrests, Castillo and Rodriguez had gotten additional tattoos related to the PLK gang.

The Criminal Case

In November 2009, the People initiated a criminal case against Castillo, Rodriguez and Ruiz. In February 2010, the People filed an amended information charging all three with the following offenses: carjacking (count 1; § 215, subd. (a)); attempted second degree robbery (count 2; §§ 664, 211); and arson of property of another (count 3; § 451, subd. (d)). As to all three counts, the information alleged the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)). As to counts 1 and 2, the information alleged a principal had personally used a handgun in the commission of the

offenses (§ 12022.53, subds. (b), (e)(1)), and that Castillo had personally used a firearm (§ 12022.53, subd. (b)).

The charges against Castillo and Rodriguez were tried to a jury where the prosecution presented evidence establishing the facts summarized above. Further, the prosecution presented testimony of a gang expert.[5] Castillo called a psychologist, who testified on the subjects of memory and suggestibility, as they related to eyewitness identifications. Rodriguez did not present any defense evidence; his counsel largely argued that the evidence did not prove the charges beyond a reasonable doubt. Rodriguez's counsel argued a similar theme and urged the jurors not to convict him merely because of his gang membership. The jury found Castillo and Rodriguez guilty as charged, and found the ancillary gang and firearm allegations to be true.

The trial court later sentenced Castillo to an indeterminate term of 15 years to life as to count 1, plus a 10-year term for the personal firearm use enhancement, for a term of 25 years to life. The court imposed a consecutive midterm of 2 years as to count 2, plus 10 years for the gun allegation, for a term of 12 years. Finally, a concurrent upper term of 3 years as to count 3, and stayed all of the remaining enhancements. The trial court sentenced Rodriguez to an indeterminate term of 15 years to life as to count 1, a consecutive upper term of 3 years as to count 2, and a concurrent upper term of 3 years as to count 3, plus 5 years for the gang allegation.

Castillo and Rodriguez filed timely notices of appeal.

DISCUSSION

Castillo's Appeal

I. The *Pitchess* Issues

Before trial, Castillo filed a motion for *Pitchess* discovery of the personnel records of Detectives Cartmill and Parisi, and Deputy B. Feehan, all of whom were involved in

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[5] The gang expert's testimony is discussed more fully below in addressing Castillo's claims on appeal.

the events surrounding Castillo's apprehension and arrest.[6] The motion sought "evidence of misconduct . . . relating to accusations that any above-named deputy engaged in acts of excessive force, bias, dishonesty, coercive conduct or acts constituting a violation of the statutory rights of others." The motion was supported by a declaration from Castillo's counsel, asserting that inculpatory statements purportedly made by Castillo at the scene of his apprehension, as recorded in the officers' reports, were "patently false" and fabricated. The trial court granted *Pitchess* discovery of Detective Cartmill's personnel records; the court denied the motion for *Pitchess* discovery of the personnel records of Deputy Feehan and Detective Parisi. On appeal, Castillo contends his convictions must be reversed because the trial court wrongly denied *Pitchess* discovery of the personnel records of Feehan and Parisi.[7] We disagree.

The Governing Law

As established in *Pitchess* and later codified in Penal Code section 832.7 et seq. and Evidence Code section 1043 et seq., a criminal defendant may compel discovery of relevant information in a police officer's personnel records upon a showing of good cause for the discovery, including how any discoverable information could support a defense to the charge against the defendant. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018-1019.) To initiate discovery, the defendant must file a motion supported by an affidavit showing good cause "first by demonstrating the materiality of the information to the pending litigation, and second by 'stating upon reasonable belief' that the police agency has the records or information at issue." (*Id.* at p. 1019.) The party must provide a "specific factual scenario" establishing a "plausible factual foundation" for the allegation of police misconduct. The two-part showing to establish good cause "is a 'relatively low threshold for discovery.' [Citation.]" (*Ibid*.) A ruling on a motion for *Pitchess* discovery is a matter within the trial court's discretion, and is reviewed under an abuse of discretion standard. (See *People v. Hughes* (2002) 27 Cal.4th 287, 330.)

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6 Detectives Cartmill and Parisi testified at Castillo's trial. Deputy Feehan did not.

7 Rodriguez joins this argument.

Deputy Fehan and Detective Parisi

In the *Pitchess* motion, Castillo alleged the following in support of the motion:

> "In their incident reports deputy(s) Cartmill and Feehan wrote that deputy Parisi had told him that he (Parisi) had already advised Castillo of the [*sic*] *Miranda* rights and that he wanted to talk to the police. On information and belief, no deputy be it Parisi or another, had *Mirandized* Mr. Castillo when Feehan and Cartmill began their custodial interrogation. Cartmill further states that Mr. Castillo admitted that he and his two co-defendants were from the gang 'Pasadena Latin Kings' and that he was the 'big homie' of this group. This is patently false. The defendant never said he was from that gang or that he was the big homie. Further, Detective Cartmill writes that the defendant yelled 'I didn't have the gun when we hit up that guy in his garden.' Cartmill also states in his report that the defendant stated 'he was guilty of everything and to just send him [to] prison.' On information and belief the defendant never made these statements. The foregoing set forth in the incident reports of Cartmill and Feehan are a fabrication of evidence and are false statements made by the the deputy(s). I have not been provided a report written by Parisi, and he is only referenced in the reports of Cartmill and Feehan." (Boldface omitted.)

Although the threshold for establishing good cause for *Pitchess* discovery is low, the trial court reasonably concluded that Castillo failed to demonstrate sufficient good cause as to Deputy Feehan. As the court correctly noted at the hearing on the *Pitchess* motion, the showing in support of the motion established little more as to Deputy Feehan than that he was present at the scene of Castillo's arrest, but it was Detective Cartmill who interviewed Castillo. Detective Cartmill wrote the report setting forth Castillo's interview statements, which Castillo claimed had been fabricated. Castillo's *Pitchess* motion did not show any allegedly fabricated interview statements reported by Deputy Feehan, whose report showed little more than that he had tried to talk to Castillo at the scene of his arrest, but Castillo "kept changing the subject and not giving . . . any

information." As Deputy Feehan explained in his report, it appeared that Castillo "was more open to talking with Detective Cartmill," so Deputy Feehan "left the car and let Detective Cartmill interview . . . Castillo."

With respect to Detective Parisi, the *Pitchess* motion showed that Detective Cartmill prepared a report which indicated that Parisi said he gave *Miranda*[8] warnings to Castillo. The motion did not show any allegedly false information in any report prepared by Detective Parisi. Turning to the information in Detective Cartmill's report about Parisi, we agree with the trial court, who noted, "[I]n terms of . . . Parisi, [the report] indicates that Cartmill was told that Parisi *Mirandized* your client, but there is no indication that Parisi lied about that . . . ." Simply stated, the declaration did not meet the threshold for establishing the good cause necessary to compel an in camera review by the court as to Detective Parisi. There was no allegation made that Parisi lied in any report that he gave Castillo his *Miranda* warnings. The allegation by Castillo was that *the police reports* said Castillo was *Mirandized* and that, in fact, he was not. The ambiguous allegation that "no deputy be it Parisi or another officer" gave Castillo his *Miranda* warnings is too general to demonstrate the requisite factual scenario of misconduct to demonstrate good cause for review of Detective Parisi's records. If Castillo wanted to review Detective Parisi's personnel records because he falsely averred that he gave *Miranda* warnings to Castillo, then Castillo could simply have stated that. He did not.

Even had the trial court been required to review the records of Detective Parisi, we find no reasonable probability that the outcome of the case would have been different. (*People v. Samuels* (2005) 36 Cal.4th 96, 110.) There was extensive evidence linking Castillo to the crimes in this case. Castillo was identified by Octavio and Dalia as the carjacker, and Castillo was identified by David as the person who attempted to rob him. The vehicle taken in the carjacking looked like the one used at the attempted robbery of David, and the carjacked vehicle was found in flames shortly after the attempted robbery. Castillo was arrested as he ran from the burning vehicle, with cigarette lighters in his

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8 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

pocket. His cohort Ruiz had the keys to the car in his pocket. The pattern on Castillo's shoe prints, and those of his cohorts Rodriguez and Ruiz, matched the shoe prints that were found near the burning Honda. Castillo was found wearing clothes similar to those provided by David in his description of his assailants. Even had there been evidence casting a wary eye on whether Detective Parisi gave *Miranda* warnings to Castillo such that Castillo's statements to Cartmill would have been subject to the jury's doubt, the independent evidence of his involvement in each of the crimes was so strong that we are convinced it would not have mattered.

Detective Cartmill

As noted above, the trial court granted Castillo's motion for *Pitchess* discovery of Detective Cartmill's personnel records, and thereafter conducted the required in camera hearing to review those records. The court ruled there was no discoverable material. On appeal, Castillo has requested that we independently review the record to determine whether the trial court properly conducted the in camera *Pitchess* discovery hearing and whether the trial court properly ruled on the reach of discovery as to Detective Cartmill's personnel records. Such review on appeal is appropriate under the procedures set forth in *People v. Mooc* (2001) 26 Cal.4th 1216.

We have reviewed the transcript of the in camera hearing, and conclude the trial court conducted the hearing properly. The court described the nature of all complaints, if any, as to Officer Cartmill, and found no discoverable evidence. Further, we find the court did not abuse its discretion in ruling that no discoverable evidence needed to be disclosed.

II. Bifurcation of Gang Enhancement

Castillo contends his convictions must be reversed because the trial court erred in denying his in limine motion to bifurcate the gang evidence involved in his case.[9] We find no error.

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[9] Rodriguez joins this argument.

In a case with allegations under the gang benefit enhancement statute, a unitary trial is permitted even if the evidence offered to prove the enhancement might be ruled inadmissible at trial of the substantive crime itself, for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1050 (*Hernandez*).) The controlling rule is that a trial court has discretion to bifurcate the trial of a gang enhancement. (*Id*. at pp. 1048-1050.) In this context, a trial court abuses discretion when the denial of bifurcation "would pose a substantial risk of undue prejudice to the defendant." (See *People v. Calderon* (1994) 9 Cal.4th 69, 77-78 [prior conviction allegations]; *People v. Hernandez, supra*, at pp. 1048-1050.) When the failure to bifurcate actually results in gross unfairness amounting to a denial of due process, a defendant's convictions must be reversed. (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

We find Castillo has not demonstrated the trial court abused its discretion in denying the bifurcation motion or that the failure to bifurcate resulted in an unfair trial denying his right to due process. In denying bifurcation, the trial court correctly recognized that some gang evidence would be admissible at trial of the substantive offenses in any event because it would be relevant both to prove a motive for the charged crimes, as well as the defendants' identities. To the extent that the evidence proving the gang enhancement allegations was separately admissible at trial of guilt, an inference of prejudice is dispelled, and bifurcation is not required. (*Hernandez, supra*, 33 Cal.4th at pp. 1049-1050.)

Assuming the trial court erred in failing to bifurcate the gang enhancement allegations, we find the decision harmless under any standard. (Compare *People v. Watson* (1956) 46 Cal.2d 818, 836 with *Chapman v. California* (1967) 386 U.S. 18, 24.) Apart from the strength of the evidence of guilt we have previously pointed out, the jury was instructed that the gang evidence could be considered only for the limited purpose of determining whether the defendants acted with the intent, purpose, and knowledge that are required to prove the charged gang enhancement, or that the defendants had a motive to commit the crimes charged. We see nothing in the record to suggest that the jury

considered the gang evidence for an improper purpose, and we presumed the jury followed the limiting instruction. (See *People v. Waidla* (2000) 22 Cal.4th 690, 725.)

III. Sufficiency of the Evidence

Castillo contends insufficient evidence underlies each of his convictions and the ancillary allegation.[10] We disagree.

The Standard of Review

In assessing a claim that the evidence is not sufficient to support a verdict, we are guided by well-settled rules: we review the entire record in the light most favorable to the verdict to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) And we presume in support of the verdict the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We will reverse for lack of substantial evidence only when, upon "no hypothesis whatever" is there sufficient evidence to support the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) It is not the role of a reviewing court to reweigh the evidence or reappraise the credibility of the witnesses, for those tasks are assigned to the trier of fact. (*People v. Jennings* (2010) 50 Cal.4th 616, 638.) Accordingly, conflicts in the evidence, and testimony that is subject to suspicion do not justify reversal of a verdict. (*People v. Lewis* (2001) 26 Cal.4th 334, 361.) Evidence may be rejected as nonsupportive of a verdict when it is physically impossible or inherently improbable. (*People v. Newman* (1999) 21 Cal.4th 413, 415.)

The Gang Allegations

Castillo and Rodriguez contend the gang findings attached to each of their three convictions must be reversed because they are not supported by substantial evidence. Castillo and Rodriguez's argument does not contest that substantial evidence supports a finding that Castillo, Rodriguez and Ruiz were members of the PLK gang. Instead, the

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10 Rodriguez joins in these arguments.

contention is that the record does not disclose substantial evidence to support findings that (1) the crimes were committed for the benefit of, at the direction of, or in association with the PLK gang; and (2) Castillo and Rodriguez had the specific intent to promote, further, or assist in criminal conduct by the PLK gang. We find the evidence shows more than Castillo and Rodriguez perceive.

The elements for a finding under the gang enhancement statute, section 186.22, may be proven by a combination of documentary evidence, eyewitness testimony and opinion testimony offered by a qualified gang expert. (See also *People v. Gardeley* (1996) 14 Cal.4th 605, 617-620; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

Pasadena Police Officer Carlo Montiglio testified as a gang expert. His testimony explained the general culture of gangs, including that violent crimes are committed by members to enhance the reputation of their gang for violence, toward the end of instilling fear and intimidation in the community, which, in turn, dissuades anyone from interfering with the gang's criminal activities or assisting police. Officer Montiglio answered a hypothetical question based on facts similar to those of the charged offenses, offering his opinion that such crimes would have been committed for benefit of, and in association with the gang. Officer Montiglio's testimony supports a finding that the charged crimes were committed for the benefit of the defendants' gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 62-63.)

Further evidence showed that, when questioned at the time of his arrest, Castillo stated he was "big homey" of the PLK gang. Officer Montiglio explained this meant that he had a high status within the gang. A reasonable inference is that Castillo was leading lower level gang members in committing the crimes. This evidence amply supports the jury's finding that Castillo and his fellow gang members "came together as gang members" to commit the charged crimes "for the benefit of, and in association with," the PLK gang. (*People v. Albillar*, *supra*, 51 Cal.4th at pp. 62-63.)

Substantial evidence also supports the "intent" prong of the jury's gang benefit finding. The gang benefit enhancement statute requires a finding that the defendant had "the specific intent to promote, further, or assist in *any* criminal conduct by gang

member—including the current offenses—and not merely *other* criminal conduct by gang members." (*People v. Albillar*, *supra*, 51 Cal.4th at p. 65.) First, as discussed above, ample evidence demonstrated that all three defendants were members of the PLK and that each defendant knew his cohorts were members of the gang. As the gang expert testified, gang members commonly commit crimes together. Substantial evidence established that Castillo and Rodriguez jointly committed the carjacking, attempted robbery, and arson. "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime." (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322, citing *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198; see also *People v. Miranda* (2011) 192 Cal.App.4th 398, 412.) "[I]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*People v. Albillar*, *supra*, at p. 68.) The evidence showed that Castillo and Rodriguez were known members of the PLK, and they assisted each other in committing the charged crimes. Accordingly, substantial evidence established that Castillo acted with the specific intent to promote, further, or assist gang members in that criminal conduct. (*Ibid.*)

Carjacking and Firearm Allegations

Castillo and Rodriguez contend their convictions for carjacking are not supported by substantial evidence. Castillo contends the finding that he personally used a firearm in the commission of the carjacking is likewise not supported by substantial evidence. The claims is that the in-court identifications by victims Octavio and Dalia do not constitute substantial evidence as they were "fraught with problems." The argument does not challenge the jury's finding that a firearm was, in fact, used. We find substantial evidence supports the jury's verdicts and the firearm enhancement.

Applying the same deferential standard of review, we find the evidence supports the jury's guilty verdicts and the firearm enhancement. Octavio and Dalia identified

Castillo and Rodriguez as the carjackers. Octavio testified that Castillo was armed with a firearm. Castillo and Rodriguez were caught as they ran from the vehicle taken in the carjacking. The argument challenging the identifications correctly notes inconsistencies in the identifications, but we are not persuaded that the inconsistencies dictate that we should overturn the jury's verdicts. Our focus in applying the substantial evidence test is not whether we would find a different verdict reasonable, but whether the verdict returned is supported by substantial evidence.

Here, any discrepancies or recollection factors tending to undermine the victims' identification testimony at trial does not mean that their identifications were physically impossible or inherently improbable. The jury heard the evidence, and was fully aware of the factors to which Castillo now points in his attempt to discredit the identifications. When the factors affecting an identification are explored at trial and where an eyewitness identification is believed by the trier of fact, the identification will be accepted on appeal as supported by substantial evidence. (*People v. Robertson* (1989) 48 Cal.3d 18, 44 [contradictions or other weakness in the witnesses' testimony "are matters to be explored on cross-examination and argued to the trier of fact"].) After hearing and considering the evidence and arguments, the jury found the victims' in-court identifications of Castillo and Rodriguez were credible, and we will not second-guess that determination. (*People v. Ennis* (2010) 190 Cal.App.4th 721, 730; see also *People v. Jennings*, *supra*, 50 Cal.4th at p. 638.) We further note that the victim identifications were supported by other strong independent evidence as we have set forth.

Attempted Robbery

Castillo and Rodriguez contend their convictions for attempted robbery must be reversed. Again, the claim is that the identification evidence is insufficient. Although the identification issue must be approached differently than the carjacking count because the attempted robbery victim, David, did not identify his assailants in court, we still find that substantial evidence supports Castillo and Rodriguez's convictions for attempted robbery.

We start with the general principle that an eyewitness's out-of-court identification may be sufficient to support a guilty verdict. (See *People v. Boyer* (2006) 38 Cal.4th 412, 480 [a testifying eyewitness's out-of-court identification is probative for that purpose and can, by itself, be sufficient evidence of the defendant's guilt even if the witness does not confirm it in court]; *People v. Cuevas* (1995) 12 Cal.4th 252, 276 [an eyewitness's out-of-court identification can be sufficient to support a conviction even if the witness recants the identification in court].) When a defendant presents a claim on appeal that an out-of-court identification is not sufficient to support a conviction, the reviewing court must "take into account the many varied circumstances that may attend an out-of-court identification and affect its probative value. These circumstances include, for example: (1) the identifying witness's prior familiarity with the defendant; (2) the witness's opportunity to observe the perpetrator during the commission of the crime; (3) whether the witness has a motive to falsely implicate the defendant; and (4) the level of detail given by the witness in the out-of-court identification and any accompanying description of the crime. [Citation.] Evidence of these circumstances can bolster the probative value of the out-of-court identification by corroborating both that the witness actually made the out-of-court identification (e.g., testimony by the police officer or other person to whom the statement was made) and that the identification was reliable (e.g., evidence that the witness was present at the scene of the crime and in a position to observe the perpetrator, evidence that the witness had a prior familiarity with the defendant, or evidence that the witness had no self-serving motive to implicate the defendant)." (*Cuevas, supra,* at pp. 267, 268.)

Castillo and Rodriguez correctly note problems with David F.'s out-of-court identification, but we cannot say that the identification was not sufficient to support the convictions for the attempted robbery of David. Despite the problems with David's out-of-court identification, the evidence as a whole supports David's identification of Castillo and Rodriguez as the attempted robbers. At trial, David testified about being driven to the field lineup, and he recalled identifying three males based on their clothing. Deputy Andrade, who assisted in the field show up where David identified Rodriguez and

Castillo, testified that David recognized the suspects based on their clothing, height and weight. David told Deputy Andrade that he (David) was "about 90, 95 percent sure" of his identification. David identified Castillo as the gunman.

An identification by a robbery victim, if believed by the trier of facts, is sufficient of itself to support a conviction; no corroborative evidence is required, nor is it required that the witness be completely free from doubt as to the identification. (See *In re Corey* (1964) 230 Cal.App.2d 813, 826.) As we have set forth before, there is also other strong independent evidence underlying his conviction.

Ultimately, the jury heard all of the evidence and was fully aware of all the factors upon which Castillo relies to discredit David's identification. Castillo and Rodriguez had an opportunity to cross-examine David and the arresting officers, and to argue that these factors made the identification of him unreliable. When, as here, the circumstances of an identification are explored at length at trial, and the identification is believed by the trier of fact, we will not declare the evidence to be so insubstantial that it requires we vacate the fact-finder's verdict. (*People v. Robertson*, *supra*, 48 Cal.3d at p. 44.)

Arson

Below, we address a contention by Castillo's cohort, Rodriguez, who argues that his conviction for arson must be reversed because the evidence is not sufficient to support the jury's finding that he aided and abetted the burning of Octavio's Honda. Castillo has joined Rodriguez's contention and argument. We reject any argument that there was no substantive evidence showing Castillo aided and abetted the arson. The evidence at trial established that, when Castillo was apprehended running away from the Honda even as it was still afire, Castillo had a lighter in his pocket. Further, as we explain in more detail below in addressing Rodriguez's argument, the jury reasonably could have found, and did find, that Castillo joined in the arson, at a minimum as one of a threesome of actors in a crime spree from the carjacking, to the attempted robbery to the arson. We are satisfied that substantial evidence supports Castillo's arson conviction.

IV. Instruction on Third Party Culpability

Castillo contends his carjacking and attempted robbery convictions must be reversed because the trial court erred in denying his request to give a pinpoint instruction on third party culpability.[11] As we understand Castillo's argument on appeal, he takes the position taken is that, whenever a defendant presents a "misidentification" defense at trial, as he did, this necessarily means that the defendant is pointing to a third party as the perpetrator of the charged crime, thus requiring instruction on third party culpability.[12] We disagree.

A trial court must instruct on a particular defense when it appears the defendant is relying on the defense and there is substantial evidence to support the defense. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) And, a trial court may be required, depending on the circumstances of trial, to give a requested instruction that pinpoints a defense theory of the case. (*People v. Bolden* (2002) 29 Cal.4th 515, 558-559.) However, a court is not required to give a pinpoint instruction that is argumentative, duplicative, or not supported by the evidence. (*Ibid.*) "[I]nstructions that attempt to relate particular facts to a legal issue are generally objectionable as argumentative . . . , and the effect of certain facts on identified theories 'is best left to argument by counsel, cross-examination of the witnesses, and expert testimony where appropriate.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 570, citing *People v. Wright* (1988) 45 Cal.3d 1126, 1137, 1143.) When a

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11 As we read and understand the record, Castillo's counsel proffered a "pinpoint" instruction that would have focused on the problems with the identifications of him as the armed assailant, meaning the evidence may have shown a third party had held the gun or been involved. The trial court ruled that the instruction on reasonable doubt was sufficient to address the law that was set out in the proffered instruction. The court indicated that Castillo's counsel could argue all aspects as to why reasonable doubt existed, including that a third party did the crimes. We do not see a copy of the rejected pinpoint instruction in the record.

12 To the extent Rodriguez joins this argument, we note that he did not request the pinpoint instruction, and did not present a misidentification defense. For purposes of discussion, we will consider his "did not prove the charges beyond a reasonable doubt" defense to mirror Castillo's misidentification defense.

pinpoint instruction on third party culpability is properly requested, an error in refusing the instruction may be found harmless where the standard instruction on reasonable doubt was given, and defense counsel was allowed to argue to the jury that a third party committed the charged crime. (*People v. Earp* (1999) 20 Cal.4th 826, 887.)

Castillo's argument does not persuade us to reverse for two reasons. First, the proffered pinpoint instruction is not in the record on appeal. As a result, Castillo has not demonstrated to us that the instruction was neither argumentative nor duplicative. In addition, no evidence supports such an instruction in this case. More importantly, we find the error in declining to give a third party culpability instruction in this case, if any, was harmless under any standard. (Compare *People v. Watson*, *supra*, 46 Cal.2d at p. 836 with *Chapman v. California*, *supra*, 386 U.S. at p. 24.) The evidence in this case overwhelmingly established Castillo's guilt; a further instruction concerning a third party's culpability would not have had any effect on the outcome of trial.

Rodriguez's Appeal

I. Sufficiency of the Evidence for Arson

Rodriguez contends his conviction for arson must be reversed because the evidence does not support a finding that he aided and abetted the burning of Octavio's Honda. Rodriguez acknowledges there is evidence showing (1) he was present at the scene of a crime against property, and (2) ran from the scene of the crime, and (3) a member of the same gang as the direct perpetrator of the crime. He claims this evidence is insufficient to support a finding that he aided and abetted the crime. We see more evidence supporting the verdict and therefore disagree.

"Whether a person has aided and abetted in the commission of a crime is a question of fact, and on appeal all conflicts in the evidence and attendant reasonable inferences are resolved in favor of the judgment." (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5.) A defendant is guilty as an aider and abettor when he knows of the unlawful purpose of the perpetrator, acts with the intent or purpose of committing, encouraging or facilitation the commission of the offense and by act or advice aids, promotes, encourages or instigates the commission of the offense. (*People v. Beeman* (1984) 35

Cal.3d 547, 561.) "Factors relevant to a determination of whether defendant was guilty of aiding and abetting include: presence at the scene of the crime, companionship, and conduct before and after the offense." (*People v. Singleton* (1987) 196 Cal.App.3d 488, 492.)

Here, because there was no eyewitness to the burning of Octavio's Honda, and no other evidence tending to show that Rodriguez said anything or did any act at the time the car was set afire, Rodriguez contends there is not sufficient evidence that he aided and abetted the arson. Not so. We acknowledge there was no direct evidence of what Rodriguez did to aid and abet the arson. However, after examining the record in light of the standard of review and the facts relevant to this determination, we find there was sufficient circumstantial evidence that he aided and abetted the arson. The arson cannot be viewed in isolation, myopically looking only to whether there was direct evidence that Rodriguez had some specific involvement in setting the car afire. Instead, these crimes were committed during a three-day crime spree that started with the carjacking of the Honda and ended when it was set ablaze to hide any evidence that might have been found inside the Honda. Rodriguez was identified as participating in both the carjacking and the attempted robbery that immediately preceded the arson, as were his fellow arrestees, Ruiz and Castillo. All three were found fleeing from the burning Honda, Ruiz with its key in his pocket and Castillo with two black cloth gloves and two cigarette lighters. All three of the men were fellow gang members, and the gang expert testified that gang members often commit crimes in groups. Shoe prints were found to match the distinctive shoot prints found near the burning car. These facts demonstrate all of the factors we are called upon to determine were present—presence at the crime scene, companionship, and conduct before and after the offense. In addition, Rodriguez's flight immediately after the arson demonstrated a consciousness of guilt.

Even without direct evidence showing specifically what Rodriguez did to aid and abet the arson, it strains credulity to assume he suddenly stopped his involvement in the three-day crime spree involving the Honda right before the car was set ablaze yet

nevertheless fled with his cohorts immediately thereafter. The jury so found, and, under the applicable standard of review, we affirm their decision.

II. Aiding and Abetting Argument

Rodriguez contends his arson conviction must be reversed because the prosecutor engaged in misconduct by misstating the law as to aiding and abetting.[13] We do not find ground for reversing.

The Setting

During the prosecutor's rebuttal argument, she made the following statement regarding the arson charge and the law of aiding and abetting, to which Rodriguez objected at trial, and objects to on appeal:

> "[W]hether Mr. Rodriguez was the one that took the lighter and lit the flame or poured whatever onto the seat and lit it on fire, or whether it was Mr. Ruiz who did it, or Mr. Castillo . . . , it does not matter. *If you believe they all acted together, they all had the intent to get rid of that evidence that implicated all of them, then they are all guilty beyond a reasonable doubt*." (Italics added.)

In response to the objection from Rodriguez's counsel, joined by Castillo's counsel, the trial court told the jurors: "I have instructed you on the law. You will get copies of the jury instructions for your review during deliberations. And you are ordered to follow the law as I give it to you."

Analysis

Rodriguez contends the prosecutor's rebuttal argument regarding the arson and aiding and abetting constituted misconduct in that misstated the law. The claim is that the prosecutor's argument misstated the law because it "implied" that a conviction "could be based simply on the fact that the defendants 'acted together' and 'had the intent to get rid of the evidence,'" without showing "who took any particular action." The misconduct

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[13] Castillo joins this argument.

requires reversal, continues Rodriguez's argument, because it resulted in a denial of his right to due process. We see no ground for reversal.

Prosecutorial misconduct occurs when a prosecutor employs either a reprehensible or deceptive method to persuade a jury. The defendant need not demonstrate bad faith on the part of the prosecutor to establish a misconduct claim because a defendant is injured by an improper trial tactic, regardless of whether it occurred inadvertently or through an intentional design. (*People v. Hill* (1998) 17 Cal.4th 800, 822-823.) It is misconduct for a prosecutor to misstate the law. (*Id*. at p. 829.) Where a reviewing court finds that misconduct infected a trial with such unfairness as to make the defendant's conviction a denial of due process, the misconduct is an error of constitutional magnitude compelling reversal of the defendant's conviction. (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

Viewing the prosecutor's entire argument as a whole as we should (see *People v. Dennis* (1998) 17 Cal.4th 468, 522), we do not see a misstatement of law amounting to misconduct. Earlier in her opening argument, in discussing the arson charge vis-à-vis the theory of aiding and abetting arson, the prosecutor acknowledged that it was not known who of the three defendants actually lit the flame or sprayed the aerosol can, but that this was not a critical gap in the prosecution's case. The prosecutor argued (without any objection) that the defendants were guilty of aiding and abetting the arson because they "participated in all of the . . . crimes together." In her rebuttal argument, the prosecutor returned to this theme, arguing that it was not necessary to prove who actually lit the flame or poured the gasoline or sprayed the aerosol in connection with the arson. The prosecutor did not misstate the law because it is correct that a person may be guilty of a charged crime without being the direct perpetrator of a criminal act—that is the very principle underlying aiding and abetting liability. The prosecutor's broadly stated summation of the law of aiding and abetting thus did not misstate the law. We see no possibility that the jury understood the prosecutor's argument to trump the trial court's instructions.

Assuming we were to construe the prosecutor's rebuttal argument as potentially misleading because it did not state all of the specific elements of aiding and abetting, we

see no possibility of prejudice to Rodriguez, that is, we do not see that the trial was fundamentally unfair resulting in a denial of due process. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) The trial court properly instructed the jury on aiding and abetting (there is no argument to the contrary on appeal), and further instructed that, if counsel's comments on the law conflicted with the court's instructions, then the jury was to follow the court's instructions. Immediately after the objection to the prosecutor's statement, the trial court admonished the jurors again that they must follow the law as it is given to them by the court.

It is long-accepted that arguments of counsel carry less weight with a jury than do instructions from the court because the former are usually billed in advance to the jury as matters of argument, and are likely viewed as the statements of advocates, whereas the latter are viewed as definitive and binding statements of the law. (See *People v. Mendoza* (2007) 42 Cal.4th 686, 703.) When argument runs counter to instructions given a jury, a reviewing court "will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 717; see also *People v. Morales*, *supra*, 25 Cal.4th at p. 47 [it is presumed that the jury understood and followed the instructions].)

III. Reasonable Doubt Argument

Rodriguez contends all of his convictions must be reversed because the prosecutor engaged in misconduct by misstating the law as it concerned to the prosecution's burden of proof beyond a reasonable doubt.[14] We disagree.

The Prosecutor's Argument

Rodriguez contends the prosecutor's rebuttal argument "suggested" to the jurors that they were allowed to find guilt beyond a reasonable doubt simply by deciding that

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[14] Castillo joins this argument.

the prosecution's evidence of guilt "was reasonable." He objects to the following passages from the prosecutor's argument:

> "There is no real dictionary definition of reasonable doubt. And different people have different interpretations. *But the law merely says reasonable doubt is what you find reasonable*. Nothing else.
>
> "It's not lingering doubt. It's not curiosity. It's not possible doubt. It's not imaginary doubt. It's not speculation. *It's certainly not near certainty*. And it's not just any doubt. It's a reasonable doubt.
>
> "So if you find *something reasonably hasn't been proven* and you have a reasonable doubt as to something, there you go. *But it's certainly not if you are left wondering or if you have a question about something . . . .*
>
> [C]ertainly, it is my job [in] prov[ing] every element to provide you with all the evidence that you need to decide whether or not the defendants are guilty. *But there are some questions that might be unanswered that are really not relevant, that don't rise to the level of reasonable doubt*." (Italics added.)

The prosecutor then proceeded to relate these concepts to a specific aspect of the case:

> "[F]or example, . . . talking about the gun allegation. And with regard to Mr. Castillo, if you are not sure who had the gun, but you are convinced – you have no reasonable doubt that a gun did exist, you just don't know whose hand it was in, that doesn't mean they are innocent. That doesn't mean that the gun allegation is untrue. It just means that [it] wasn't answered for you [that Mr. Castillo held the gun. But], legally, you could still find they are guilty of that allegation . . . . But just because we don't know who had the gun or because you haven't decided that or it was unclear from the evidence does not rise to the level of reasonable doubt."

A moment later, this same theme with regard to the arson charge, the prosecutor continued:

"[*I*]*t certainly doesn't need to be proven who held the lighter, who lit the flame, who poured the gasoline or who sprayed that aerosol can. It's not relevant. And it doesn't rise to the level of reasonable doubt. It's just a question. And sometimes all the questions can't be answered*." (Italics added.)

A moment later, the prosecutor was commenting on punishment for the gang enhancement, and, in that context, stated:

"You are not to consider punishment. . . . All you need to consider and all that's proper for you to consider is the evidence and whether that proves beyond a reasonable doubt that the allegation is true. It carr[ies] the same burden as every crime and allegation. [¶] And proof beyond a reasonable doubt is . . . not [whatever is] possible, not speculative. *You get to decide what's reasonable*." (Italics added.)

The prosecutor regularly used employed the word "reasonable" in the remainder of her argument.

Analysis

Rodriguez contends the prosecution's characterization of the reasonable doubt standard as merely requiring a determination of "what is reasonable" crossed a line into an area of wrongful argument which was disapproved of in cases such as *People v. Johnson* (2004) 119 Cal.App.4th 976 (*Johnson*) and *People v. Nguyen* (1995) 40 Cal.App.4th 28 (*Nguyen*). Rodriguez claims the prosecutor's argument at his trial essentially equated the "beyond a reasonable doubt" standard of proof to a standard akin to a "preponderance of the evidence." Rodriguez also contends the prosecutor's argument "inverted the burden of proof" by suggesting that the jurors could reject the defense's interpretation of the trial evidence if the defense did not prove its position beyond a reasonable doubt.

As an initial matter, we agree with the People's argument that Rodriguez forfeited his claim regarding the prosecutor's alleged misstatements of the law of reasonable doubt by not objecting and requesting a curative admonition timely. (*People v. Dykes* (2009)

46 Cal.4th 731, 760; *People v. Stanley* (2006) 39 Cal.4th 913, 959; *People v. Brown* (2003) 31 Cal.4th 518, 553.) Because nothing in the record suggests an objection and admonition would not have cured any harm in this case, Rodriguez's claim is not cognizable on appeal. (*People v. Combs* (2004) 34 Cal.4th 821, 854; see also *People v. Lee* (2011) 51 Cal.4th 620, 646.)

Assuming Rodriguez's claim of error were subject to review on appeal, we would not reverse. We do not see misconduct in the form of a misstatement of the law. (*People v. Hill, supra*, 17 Cal.4th at p. 829.) The prosecutor's argument essentially consisted of urging the jurors to view the testimony of certain witnesses as being reasonable. No case in Rodriguez's briefs on appeal holds that it is misconduct for a prosecutor to argue to a jury that a witness's testimony was reasonable and should be believed. We disagree with Rodriguez that the prosecutor did more at his trial. The prosecutor did not, as Rodriguez argues, suggest to the jurors that they could convict him upon proof less than beyond a reasonable doubt. Rather, the prosecutor argued that it was permissible for them to make determinations as to the reasonableness of certain witnesses' testimony in deciding guilt.

But even assuming the prosecutor engaged in misconduct by misstating the law in some "suggestive" manner as Rodriguez argues, we would not reverse. Under federal or state constitutional standards, misconduct does not warrant reversal unless it infects the trial with fundamental unfairness, or rises to a level of being deceptive or reprehensible. (*People v. Harrison* (2005) 35 Cal.4th 208, 242; *People v. Cole* (2004) 33 Cal.4th 1158, 1202.) Viewed in the context of the argument as a whole (*People v. Dennis*, *supra*, 17 Cal.4th at p. 522), the prosecutor's arguments do not justify reversal because they neither caused Rodriguez's trial to be fundamentally unfair nor rose to a level of being deceptive or reprehensible.

Rodriguez's reliance on *Johnson, supra,* 119 Cal.App.4th 976 for a different conclusion is not persuasive. In *Johnson*, the trial court's voir dire "amplified at length" on the concept of proof beyond a reasonable doubt as stated in the standard jury instruction. (*Id.* at p. 979.) The court discussed "everyday decisionmaking in a juror's life," and spoke individually with several jurors using hypothetical situations to

emphasize this point. (*Id.* at p. 980.) The court invited the jurors to "make the 'kind of decisions you make every day in your life'" in deciding between guilty and not guilty. (*Id*. at p. 983.) Then, in argument to the jury, the prosecutor "took his cue" from the trial court's pretrial reasonable doubt comments, and expressly "equated proof beyond a reasonable doubt to everyday decisionmaking in a juror's life." (*Id*. at pp. 982-983.)

Rodriguez's current case is not akin to *Johnson*. Here, the prosecutor made a series of comments during closing arguments, urging the jurors to consider the prosecution evidence to be reasonable. Here, we are not dealing with comments by the trial court carrying the imprimatur of correct statements of law. Here, the trial court properly instructed the jury on proof beyond a reasonable doubt.

We are similarly unpersuaded by Rodriguez's reliance on *Nguyen, supra,* 40 Cal.App.4th 28. In *Nguyen*, the prosecutor's argument again equated the reasonable doubt standard to the standard "used in daily life" for deciding important matters such as "whether to change lanes or marry." The Court of Appeal questioned such argument, but concluded that any error was harmless because the jury had been correctly instructed on the standard. (*Id*. at pp. 36-37.) We do not view the prosecutor's remarks at Rodriguez's trial as similar to those in *Nguyen.* The prosecutor in this case did not equate the burden of proof to a reasonableness "daily life" standard. Instead, the prosecutor argued that certain parts of the prosecution's evidence could be accepted because they were reasonable. The prosecutor did not invite the jurors to convict based on less than proof beyond a reasonable doubt.

Last, even were we to assume the prosecutor's argument stepped over the line into an area of error, the trial court properly instructed the jury on the prosecution's burden of proof. Any misstatement of the law in argument was harmless in light of this and the jury instruction given which informed the jury that any counsel's recitation of the law which conflicts with that of the judge are to be disregarded. Given the tenor and context of the prosecutor's remarks, and the instructions to the jury by the trial court, and the strong evidence of guilt, we see no likelihood that the jury convicted Rodriguez based upon a

determination that was made in anything less than in accord with proof beyond a reasonable doubt.

The Ineffective Assistance of Counsel Claim

In an alternate route to the same intended destination of reversing his convictions, Rodriguez claims his trial counsel was ineffective for failing to object to the prosecutor's complained-of statements concerning the reasonableness of the prosecution's evidence.[15] We find no ineffective assistance of counsel.

"The claim of ineffective assistance of counsel involves two components, a showing the counsel's performance was deficient and proof of actual prejudice." (*People v. Garrison* (1989) 47 Cal.3d 746, 786, citing *Strickland v. Washington* (1984) 466 U.S. 668.) On direct appeal, a conviction will be reversed for ineffective assistance of counsel only where the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (See *People v. Lucas* (1995) 12 Cal.4th 415, 442; and *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058.) Apart from deficient performance, a claim of ineffective assistance of counsel is unavailing when the defendant fails to show prejudice. (*Strickland v. Washington, supra,* 466 U.S. at p. 697.)

Here, Rodriguez has not demonstrated deficient performance because the decision whether to object during trial is an inherently tactical decision that only rarely may be second-guessed in the context of a claim of ineffective assistance of counsel. (See, e.g., *People v. Harris* (2008) 43 Cal.4th 1269, 1290.) We find this particularly true here, where argument by counsel is involved, as opposed to an issue of law or instructions. More importantly, for the reasons noted above, we find an objection would have been unjustified because the prosecutor's "reasonable" comments were not misconduct. Finally, as we noted above, even assuming that an objection or objections should have been interposed, we find no prejudice. Given the strength of the evidence of guilt, and the context of the prosecutor's argument, and the instructions given to the jury by the trial

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[15] Castillo joins this argument.

court, we see no likelihood that the outcome of Rodriguez's trial would have been different had his counsel objected during the prosecutor's argument.

IV. Joinder

Rodriguez has joined in Castillo's arguments on appeal. Because we have found no errors on the arguments raised by Castillo, we find no error insofar as Rodriguez has joined Castillo's arguments.

DISPOSITION

The judgments are affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.